

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:  
GARDEN CITY BOXING CLUB, INC.,  
:  
Plaintiff,  
:  
- against -  
:  
OUSMANE FOFANA and NEW RESTAURANT  
BON APETIT CORP.,  
:  
Defendants.  
:  
- - - - -x

**MEMORANDUM DECISION**

05 Civ. 3409 (DC)

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**APPEARANCES:** LONSTEIN LAW OFFICE P.C.  
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OUSMANE FOFANA  
Pro Se Defendant  
46 St. Nicholas Ave.  
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**CHIN, D.J.**

This is one in an array of cases brought by plaintiff Garden City Boxing Club, Inc. ("Garden City") to recover for unauthorized showings of Pay-Per-View boxing broadcasts in commercial establishments. Here, Garden City moves for summary judgment as to liability against defendant Ousmane Fofana, alleging that Fofana violated 47 U.S.C. § 605 and § 553, for his role in showing the Oscar de la Hoya/Bernard Hopkins boxing program (the "Fight") at the Restaurant Bon Appetit ("Bon Appetit") on September 18, 2004 -- without properly

obtaining a license. For the reasons that follow, the motion is granted.<sup>1</sup>

### **BACKGROUND**

#### **A. The Facts<sup>2</sup>**

Garden City owns exclusive broadcast rights to the Fight. (Affidavit of Joseph Gagliardi ("Gagliardi Aff.") ¶ 3 & Ex. 1). On September 18, 2004, Bon Appetit, a commercial establishment, was open for business, and had the capability to receive satellite and/or cable television broadcasts. (Affirmation of Julie Cohen Lonstein ("Lonstein Aff.") Ex. A). That evening, Bon Appetit exhibited a portion or all of the Fight, even though Bon Appetit was not authorized by Garden City to display it. (Id.).

Fofana, the officer, director, shareholder, and/or principal of Bon Appetit, was the individual with supervisory capacity over the activities of the restaurant on that date, and he received a financial benefit for displaying the Fight. (Id.).

#### **B. Procedural History**

On or about May 30, 2005, plaintiff commenced the present action against defendants, alleging that defendants

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<sup>1</sup> This motion has been filed only against Fofana. Because Bon Appetit never answered, Garden City has separately moved for a default judgment against Bon Appetit.

<sup>2</sup> Fofana did not respond to plaintiff's requests for admission. Accordingly, pursuant to Rule 36 of the Federal Rules of Civil Procedure, those requests are deemed admitted as a matter of law. See Fed. R. Civ. P. 36(a).

violated 47 U.S.C. §§ 553 and 605, by showing the Fight in their establishment for direct commercial gain without authorization from plaintiff.

On or about July 21, 2005, plaintiff received two notices of motion and an affirmation from Fofana. The documents requested an enlargement of time to answer. Subsequently, on September 2, I ruled that one of the notices of motion would be deemed Fofana's pro se answer, and that the other motion would be denied as moot.

On September 7, 2005, plaintiff served Fofana with discovery requests, including, inter alia, requests for admission. Having not received a response, plaintiff sent a letter to Fofana -- in an attempt to compel discovery -- five days prior to his deadline to respond to the requests for admission.

On November 4, 2005, Fofana appeared at a conference before me. I ordered that all discovery was to be completed by January 20, 2006, and that Bon Appetit, the corporate defendant, would be given an additional two weeks to obtain counsel.

To date, Bon Appetit has not filed an answer, and thus, there is a request to enter default pending against it. In addition, Fofana has not responded to plaintiff's discovery requests. On December 12, 2005, plaintiff filed a "Notice of Facts Deemed Admitted," informing Fofana that his failure to respond to plaintiff's requests for admission were considered to be admissions pursuant to Fed. R. Civ. P. 36. (Lonstein Aff. ¶

10 & Ex. C). On March 1, 2006, plaintiff filed the instant motion for summary judgment against Fofana. Fofana has not responded to the motion.

### DISCUSSION

#### **A. Applicable Law**

##### **1. Summary Judgment Standard**

Summary judgment will be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986). Accordingly, the court's task is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Summary judgment is inappropriate if, resolving all ambiguities and drawing all inferences against the moving party, there exists a dispute about a material fact "such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248; accord Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir. 1991).

To defeat a motion for summary judgment, however, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus., 475 U.S. at 586. There is no issue for trial unless there exists sufficient evidence in the record favoring the party

opposing summary judgment to support a jury verdict in that party's favor. Anderson, 477 U.S. at 249-50. "If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e); Patterson v. County of Oneida, New York, 375 F.3d 206, 219 (2d. Cir. 2004).

**2. The Piracy Statutes -- 47 U.S.C. § 605 and § 553**

Section 553 provides that "no person shall intercept or receive . . . any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law." 47 U.S.C. § 553(a)(1). Section 605 provides that "[n]o person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto." 47 U.S.C. § 605(a). Section 605 has been interpreted to apply to the interception of satellite communications. See Int'l Cablevision, Inc. v. Sykes, 75 F.3d 123, 133 (2d Cir. 1996) ("Section 605 not only prohibits unauthorized interception of traditional radio communications, but also communications transmitted by means of new technologies. For example, existing section 605 provides protection against the unauthorized reception of . . . satellite communications. This amendment . . . is intended to preserve this broad reach.") (quoting 130 Cong. Rec. S130, reprinted in 1984 U.S.C.C.A.N. 4746); see also

Garden City Boxing Club, Inc. v. Guzman, No. 03 Civ. 8776, 2005 WL 1153728, at \*2 (S.D.N.Y. Apr. 26, 2005) ("[W]hen the transmission involves a radio or satellite signal, section 605 is appropriately applied, whether the defendant intercepts that signal directly or indirectly.") (citations omitted).

If a defendant has violated both § 553 and § 605, the Court should award damages only under § 605. See Int'l Cablevision, Inc. v. Sykes, 997 F.2d 998, 1009 (2d Cir. 1993) ("If [Section 605] was violated and [the plaintiff] was aggrieved thereby, the court should grant [the plaintiff's] request for damages under § 605(e) instead of granting the lesser damages under § 553.").

**B. Application**

Here, as a result of Fofana's failure to respond to plaintiff's requests for admission, and his failure to oppose this motion, the Court is left with only plaintiff's version of the facts. Under those facts, Fofana was the shareholder and/or principal of Bon Appetit -- and was responsible for the activities of Bon Appetit on the night of September 18, 2004 when the Fight was shown. Moreover, the restaurant showed the fight through closed circuit cable television without permission from plaintiff, and thus, must have used either an illegal satellite receiver to intercept plaintiff's signal, or an illegal cable converter box to intercept plaintiff's broadcast. Fofana is therefore liable under both § 553 and § 605. See Kingvision Pay-Per-View, 2002 WL 654137, at \*3 (finding a violation of both §

553 and § 605 where defendants intercepted and received boxing fight without authorization at commercial establishment). Where a defendant has violated both § 553 and § 605, however, plaintiff's damages should be calculated under § 605. See Sykes, 997 F.2d at 1009.

Accordingly, the Court concludes that there is no genuine issue for trial, and that a reasonable juror could only find that Fofana illegally broadcast the Fight in violation of the Piracy Statutes. Summary judgment on the issue of liability against Fofana is granted.

**CONCLUSION**

For the foregoing reasons, plaintiff's motion for summary judgment as to liability against Fofana is granted. On or before October 20, 2006, Garden City shall submit a proposed judgment setting forth its proposed damages, attorneys' fees, and costs. Fofana may object to the proposed judgment on or before October 27, 2006.

SO ORDERED.

Dated: New York, New York  
October 13, 2006

  
Denny Chin  
United States District Judge